**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | CG Docket No. 02-278 |
| Rules and Regulations Implementing the | ) | DA 05-1346 |
| Telephone Consumer Protection Act | ) | DA 05-1347 |
| of 1991 | ) | DA 05-1348 |

To: The Commission

**COMMENTS OF THE**
**NATIONAL ASSOCIATION OF BROADCASTERS**

## I. Introduction and Background.

The National Association of Broadcasters ("NAB")[1] submits these comments in response to numerous petitions for declaratory rulings on the preemptive effects of the Telephone Consumer Protection Act ("TCPA").[2] The Commission has already determined that prerecorded messages sent by radio or television broadcasters that invite audiences to tune in to broadcasts at a particular time for a chance to win a prize or

[1] NAB is a nonprofit, incorporated association of television and radio stations which serves and represents the American broadcast industry.

[2] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Petition for Declaratory Ruling*, CG Docket No. 02-278 (Aug. 11, 2003) (hereinafter "*Boling Petition*"); In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Joint Petition for Declaratory Ruling That the FCC Has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing*, CG Docket No. 02-278 (Apr. 29, 2005) (hereinafter "*33 Joint Petitioners*"); In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Petitions For Declaratory Rulings*, CG Docket No. 02-278 (filed between Aug. 24, 2004 and Nov. 22, 2004) (hereinafter "*6 Petitioners*").

similar opportunity are permissible commercial calls that "d[o] not include or introduce an unsolicited advertisement or constitute a telephone solicitation," so long as "the purpose of the message is merely to invite a consumer to listen to or view a broadcast."[3] The Commission recently affirmed this determination in its *Second Order on Reconsideration*.[4]

The *Boling Petition* asks the Commission to declare that the California Consumer Legal Remedies Act ("CLRA"),[5] as applied to interstate telephone calls (which would include prerecorded messages sent by radio and television broadcasters), is not preempted by the TCPA. As discussed in detail below, NAB strongly opposes the *Boling Petition* because such a reading would conflict with and frustrate the federal scheme of uniform regulations established by the TCPA. Further, NAB supports the *33 Joint Petitioners'* and *6 Petitioners*' requests that the Commission reaffirm its exclusive federal jurisdiction over interstate telephone calls as consistent with the goals of Congress and the rules of the Commission. In the alternative, should the Commission grant the *Boling Petition*, it should clarify that, consistent with the rulings of the Commission, the CLRA is not applicable to broadcasters' use of prerecorded messages.

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[3] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, *Report and Order*, 18 FCC Rcd 14014 (2003) at ¶ 105 (hereinafter "*TCPA Order*") (*citing* 47 C.F.R. § 64.1200(a)(2)(iii)).

[4] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, *Second Order on Reconsideration*, 34 CR 1371 (2005) at ¶ 42.

[5] California Civil Code §§ 1750 et. seq.

## II. Broadcasters' Use Of Prerecorded Messages To Invite Audiences To Tune Into A Station Is Permissible.

The Commission has already determined that the plain language of the TCPA does not prohibit broadcasters' use of audience invitation calls. Prerecorded audience invitation calls do not contain an "unsolicited advertisement"[6] within the defined meaning of that term as a message that advertises the "commercial" availability or quality of property, goods, or services.[7] As numerous courts have recognized, broadcast stations do not stand in a commercial relationship with their audiences.[8] Over-the-air broadcasts are not "commercially" available to listeners and viewers; instead, they are available for free to anyone with access to a television or radio receiver. Stated differently, inviting an individual to watch or listen to a freely available program does not propose a commercial transaction.[9] Accordingly, the Commission properly has concluded that calls

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[6] *TCPA Order* at ¶ 105.

[7] 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5). Of course, this express statutory definition precludes other plausible interpretations of the term "advertisement." At least one court has made clear that the TCPA's statutory definition of the word "advertisement" is considerably narrower than its colloquial usage. *Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 181-82 (E.D. Pa. 1994) (holding that a "company's advertisement of available job opportunities" is not an "advertisement" within the meaning of the TCPA).

[8] *See, e.g., Pathfinder Communications Corp. v. Midwest Communications Co.*, 593 F. Supp. 281, 283 (N.D. Ind. 1984).

[9] The fact that a particular radio or television station is licensed to a commercial enterprise does not transform a free broadcast into a commercial transaction. Such reasoning impermissibly would conflate the commercial character of a caller's business with the commercial availability of the caller's goods or services. Indeed, the distinction is vital given the unique nature of a broadcast station's relationship to its audience. To be sure, many broadcasters are "commercial" inasmuch as they sell broadcast commercials to advertisers. But this is of no consequence under the relevant exemption, which expressly contemplates that lawful recorded messages may be sent by commercial enterprises. 47 C.F.R. § 64.1200(c)(1). The question is not whether the caller is a "commercial" entity, but whether the call itself encourages a purchase by advertising the

encouraging audiences to tune in to a broadcast are exempt from the TCPA's prohibitions against prerecorded calls to residences.[10]

## III. The TCPA Clearly Preempts State Jurisdiction Over Interstate Telephone Solicitations.

As discussed above, broadcasters' use of prerecorded messages is permissible under the TCPA, both for intrastate and interstate purposes. Moreover, in enacting TCPA, Congress expanded the Commission's jurisdiction to include both intrastate and interstate telephone calls.[11] When implementing the TCPA, the Commission discussed these jurisdictional and preemption issues in detail:

> Congress enacted section 227 and amended section 2(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls … we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules …
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> *We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.* We will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission. *We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules.*[12]

This reasoning is particularly apt when considering broadcasters' audience invitation calls. As the Commission and the courts have consistently recognized,

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existence or quality of goods or services that are commercially available to call recipients.

[10] 47 C.F.R. §§ 64.1200(a)(2) and 64.1200(c)(1).

[11] Pub. L. No. 102-243, 105 stat. 2394 (1991) (codified at 47 U.S.C. § 227).

[12] *TCPA Order* at ¶¶ 83-84 (emphasis added)(footnotes omitted).

broadcasting is an inherently interstate service.[13] And, broadcast station service areas frequently overlap state lines. Thus, if an individual state's regulations could contradict federal law with regard to these calls, a broadcaster could be in the anomalous position of being able to legally contact only a portion of its audience. The result would be confusing and would not serve the public interest.

NAB agrees with the *Six Petitioners*[14] that the Commission must affirmatively assert its preemptive authority over state regulations applying to interstate calls. Moreover, NAB agrees with the *33 Joint Petitioners* that "federal law dictates a broad, jurisdictional approach to the regulation of interstate telemarketing."[15] Not only do inconsistent state rules frustrate the federal objective of uniformity, but also impose high compliance costs and increase consumer confusion, implicating all three of the concerns

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[13] *See Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co*., 289 U.S. 266, 279 ("No state lines divide the radio waves, and national legislation is not only appropriate but essential to the efficient use of radio facilities"); *Fisher's Blend Station v. Tax Commission of State of Washington*, 297 U.S. 650, 655 (1936) ("By its very nature broadcasting transcends state lines and is national in its scope and importance--characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause"); *see also Allen B. Dumont Laboratories, Inc. et al., v. Carroll et al*., 184 F.2d 153, 154 (1950) ("There is no doubt but that television broadcasting is in interstate commerce. This is inherent in its very nature").

[14] The *Six Petitioners* argue that a lack of state exemptions for political polling, a narrower view of an established business relationship, and more restrictive identification procedures conflict with broader federal law. With regard to the established business relationship, the TCPA and the Commission's rules allow for an exemption for three months following a consumer inquiry and an eighteen-month exemption to contact past purchasers. *TCPA Order* at ¶ 42. The challenged state rules are much narrower, with business relationship exemptions that only include current customers and those who have expressly requested a telephone call. This inconsistency has caused several petitioners to become targets of state enforcement action for interstate calls that are legal under the TCPA and the Commission's rules.

[15] *33 Joint Petitioners* at 33.

the Commission voiced in requesting interested parties to file for declaratory relief.[16] Simply stated, federal law should preempt more restrictive state regulations for interstate calls, including telephone calls that include prerecorded messages in the state of California.

## IV. CLRA Provisions Governing Interstate Calls Involving Prerecorded Messages Are Preempted By Federal Law.

Section 227(b)(1)(B) of the TCPA provides that it is unlawful "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B)."[17] The exemptions include calls not made for commercial purposes and other categories that the Commission finds "will not adversely affect the privacy rights that this section is intended to protect" and "do not include the transmission of any unsolicited advertisement."[18] By prohibiting the initiation of certain calls, Congress is in effect preventing these calls from reaching individuals. Thus, the TCPA regulates certain types of telephone calls or messages sent by callers for receipt by listeners.

Petitioner Boling's attempts to confuse this clear directive by distinguishing between initiating a call and receiving a call. Their argument, that the "initiation" of the call violates the TCPA while the "receipt" of the call violates the CLRA, is an inaccurate

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[16] *TCPA Order* at ¶ 83.

[17] 47 U.S.C. § 227(b)(1)(B).

[18] *Id*. at § 227(b)(2)(B).

statement of both laws.[19] Arguing that TCPA governs only the initiation is an illogical reading of that statute. While the Act prohibits the "initiation" of certain telephone calls, Congress was ultimately concerned with their *receipt*, instructing the Commission to conduct "a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid *receiving* telephone solicitations to which they object."[20] To avoid receipt by the listener, the statute necessarily prevents initiation by the caller. Initiation (or delivery) is also the action that the California statute seeks to prevent when it prohibits "disseminating an unsolicited prerecorded message."[21] The receipt of such information, however, cannot be separated from the initiation as a separate violation.

Moreover, CLRA directly conflicts with the TCPA when it is enforced against interstate callers.[22] CLRA itself makes no distinction between intrastate and interstate calls. Specifically, California Civil Code §1770(a)(22) prohibits:

> *Disseminating an unsolicited prerecorded message* by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

Thus, interstate calls that involve prerecorded messages would be subject to stricter regulations in California than permitted under the TCPA. *See* 47 U.S.C. §227(b)(1)(B). NAB strongly disagrees with Petitioner Boling's statement that "the interstate nature of

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[19] *Boling Petition* at 6.

[20] 47 U.S.C. § 227(c)(1) (emphasis added).

[21] California Civil Code §1770(a)(22)(A).

[22] *Boling Petition* at 5-7.

the sending call is irrelevant."[23] Rather, it is the controlling factor in determining federal preemption.

Were, however, the Commission to grant the *Boling Petition*, NAB urges the Commission to make clear that the CLRA is inapplicable to prerecorded messages sent by radio or television broadcasters that merely invite audiences to tune in to broadcasts at a particular time for a chance to win a prize or similar opportunity. NAB is concerned that, absent clarification, a granting of the *Boling Petition* would invite further class action litigation and expose broadcasters to significant liability in California.[24] Indeed, CLRA makes clear that its restrictions on the use of prerecorded messages applies only to "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction *intended to result or which results* in *the sale or lease of goods or services.*"[25] Thus, under both the TCPA and CLRA, broadcasters' use of prerecorded messages to invite audiences to listen or watch free-over-the-air broadcasting would be exempt from regulation.

## V. Conclusion.

NAB urges the Commission to deny the *Boling Petition* and reaffirm exclusive federal jurisdiction over interstate telemarketing. Based on the strong Congressional and Commission intent to create a uniform system of regulation for interstate telemarketing, NAB strongly opposes the *Boling Petition*. In addition, NAB supports the *33 Joint*

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[23] *Id.* at 6.

[24] Two of NAB's members have already incurred significant expense in successfully defending against class action suits in the State of Georgia. *See Carver v. Susquehanna Radio Corp*., Civ. No. 00-VS-002168-F (Fulton County); *Abt v. Cox Radio, Inc*., Civ. No. 01-VS-017817 (Fulton County).

[25] California Civil Code §1770(a) (emphasis added).

*Petitioners'* and *6 Petitioners*' requests that the Commission reaffirm its exclusive federal jurisdiction over interstate telephone calls as a means to provide certainty to market participants. Were the Commission to grant the *Boling Petition*, however, NAB urges the Commission to clarify that broadcasters' use of prerecorded messages, which are exempt under the TCPA, are also not subject to regulation under the CLRA.

Respectfully submitted,

**NATIONAL ASSOCIATION OF BROADCASTERS**
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Marsha MacBride
Jerianne Timmerman
Ann West Bobeck

Joshua Pila
Lindsay Stoudt
NAB Law Clerks

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